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In the Supreme Court of the United States

OCTOBER TERM, 1975

JESUS LOZANO SANCHEZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. 15a-18a) is reported at 521 F.2d 244. The opinion of the district court (Pet. App. 1a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975, and a petition for rehearing was denied on January 12, 1976. The petition for a writ of certiorari was filed on April 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon forfeiture of personal appearance bonds, the amount forfeited should be limited to the

government's monetary loss rather than the full amount posted for bail.

2. Whether the court of appeals properly applied Texas agency law in holding the surety liable on two bail bonds on the theory that it had clothed its agent with apparent authority to execute the bonds.

STATEMENT

Fred E. Everett, agent of petitioner Surety Insurance Company of California (Surety), executed in the United States District Court for the Southern District of Texas two personal appearance bonds, for \$20,000 each, on behalf of petitioners Sanchez and Rivas, co-defendants in a federal criminal prosecution.¹ When Sanchez and Rivas failed to appear in court as required, a judgment of forfeiture was entered. After an evidentiary hearing, the district court denied petitioner Surety's motion to set aside the judgment (Pet. App. 1a-14a). The court of appeals affirmed *per curiam* (*id.* at 15a-18a).

1. Evidence at the hearing before the district court showed that petitioner Surety filed with the clerk of the district court a "General Power of Attorney" pursuant to which it appointed Everett its agent to execute bail bonds for amounts up to \$50,000, but stipulated that Surety would file separate powers of attorney for each bond to be executed (Pet. App. 15a-16a). Surety thereafter sent to Everett two powers of attorney to be filed with the court, authorizing him to execute bail bonds for no more than \$5,000 and \$10,000, respectively. Everett fraudulently altered these powers of attorney to make them appear that Surety authorized the execution

¹Sanchez and Rivas were charged with conspiring to possess heroin and cocaine with intent to distribute and the substantive offense, in violation of 21 U.S.C. 841(a)(1) and 846. They remain fugitives.

of bonds for no more than \$25,000 and \$30,000; he then filed them with the court and executed the two \$20,000 bonds on behalf of Sanchez and Rivas.²

2. On its motion to set aside the judgment of forfeiture, Surety contended that it should not be liable because Everett had no authority to issue the two \$20,000 bonds. The court determined that under the Texas law of agency, Surety was liable because it had clothed Everett, its agent, with apparent authority to execute the two bonds by filing with the clerk of the district court a general power of attorney in Everett's name for bonds up to \$50,000, and by sending to Everett the two individual powers of attorney that he altered (Pet. App. 9a), and because the magistrate who accepted the bonds on behalf of the court was not negligent in failing to detect the alterations (Pet. App. 12a).

ARGUMENT

1. Petitioner Surety contends (Pet. 6-7) that the amount forfeited on the bonds should have been limited to the actual monetary loss suffered by the government from the failure of Sanchez and Rivas to appear in court as required. The personal appearance bonds, however, were contracts between the government and Surety, wherein Surety agreed to pay a total of \$40,000 if Sanchez and Rivas failed to appear. *Williams v. United States*, 444 F.2d 742, 744 (C.A. 10), certiorari denied *sub nom. United Bonding Insurance Co. v. United States*, 404 U.S. 938; *United*

²Everett intended to profit from his scheme by representing to Surety that he collected \$1500 in premiums from Sanchez and Rivas (an amount equaling 10 percent of the bonds that Everett had actual authority to execute), whereas in fact he had collected \$4000 in premiums from them (Pet. App. 5a-8a).

States v. Davis, 202 F.2d 621 (C.A. 7). That figure in effect represented agreed-upon liquidated damages for Surety's failure to assure that Sanchez and Rivas appeared; accordingly, the terms of the bond established Surety's liability, and the government did not need to prove specific damages.

2. Petitioner Surety also contends (Pet. 7-10) that the court of appeals improperly applied the Texas law of agency.³ That issue of State law, however, does not warrant further review. In any event, under Texas law a principal is liable when, as here, he clothes his agent with apparent authority and when the party with whom the agent contracts on behalf of the principal is reasonably prudent. *T. H. Baker & Co. v. Kellett Chatham Machinery Co.*, 84 S.W. 661 (Ct. App. Tex.); *Great American Ins. Co. v. Sharpstown State Bank*, 460 S.W. 2d 117, 122 (Tex. S. Ct.); *Bankers Life Ins. Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1004-1006 (C.A. 5); *Mechanical Wholesale Inc. v. Universal-Rundle Corp.*, 432 F.2d 228, 230 (C.A. 5).⁴

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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³A bail bond, as a contract between the government and the surety, should be construed under the law of the state in which it was executed. *United States v. D'Anna*, 487 F.2d 899 (C.A. 6).

⁴Petitioner Surety mistakenly relies on several Texas decisions (Pet. 8, 9) which hold that when powers of attorney are used to create an agency relationship, the written powers are to be construed narrowly and the agent's actual authority is therefore limited to powers explicitly granted in the written instrument. The question in the instant case does not concern the scope of the agent's actual authority, however, but only whether he had apparent authority notwithstanding an absence of actual authority.